

Amendment No. 1 to HB0810

Sexton C
Signature of Sponsor

AMEND Senate Bill No. 1230

House Bill No. 810*

by deleting all language after the enacting clause and substituting instead the following:

SECTION 1. This act shall be known and may be cited as the "Elderly and Vulnerable Adult Protection Act."

SECTION 2. Tennessee Code Annotated, Title 39, Chapter 15, is amended by adding the following as a new, appropriately designated part:

39-15-501.

As used in this part, unless the context otherwise requires:

(1) "Abuse" means the infliction of physical harm or psychological injury on an elderly or vulnerable adult;

(2) "Caretaker":

(A) Means a person, as defined in § 39-11-106(a), who has a duty to provide care, or who has otherwise affirmatively assumed a duty for an elderly or vulnerable adult, arising by contract, by formal or informal agreement, or by means of a court order from a court of competent jurisdiction; and

(B) Does not include a financial institution as a caretaker of funds or other assets unless the financial institution has entered into an agreement, or has been appointed by a court of competent jurisdiction, to act as a trustee with regard to the property of the adult;

(3) "Elderly adult" means a person sixty-five (65) years of age or older;

(4) "Financial exploitation" means the unlawful appropriation or use of an elderly or vulnerable adult's property, as defined in § 39-11-106(a), for one's own benefit or that

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of a third party. For purposes of this subdivision (4), the state may establish that an unlawful appropriation or use has occurred through theft, undue influence, coercion, harassment, duress, deception, fraud, intimidation, false representation, or false pretenses. If the unlawful appropriation or use has occurred through the use of an instrument that conferred a fiduciary duty on another person or a third party, the state is not required to prove that an appropriation or use of property was unlawful, so long as the state establishes an intent to deceive or defraud by the fiduciary in obtaining the right to act in a fiduciary capacity for the elderly or vulnerable adult;

(5)

(A) "Neglect" means:

(i) The failure of a caretaker to provide the care, supervision, or services necessary to maintain the physical and mental health of an elderly or vulnerable adult, including, but not limited to, the provision of food, water, clothing, medicine, shelter, medical services, and any medical treatment plan prescribed by a healthcare professional, hygiene, or supervision that a reasonable person would consider essential for the well-being of an elderly or vulnerable adult;

(ii) The failure of a caretaker to make a reasonable effort to protect an elderly or vulnerable adult from abuse, neglect, or exploitation by others;

(iii) Abandonment, which is the knowing desertion or forsaking of an elderly or vulnerable adult by a caretaker under circumstances in

which there is a reasonable likelihood that bodily injury or psychological injury could occur; or

(iv) Confinement, which is the knowing restriction of movement of an elderly or vulnerable adult by a caretaker. Restricting one's movement includes, but is not limited to, the use of force, medication, intimidation, or restraint. Confinement does not include restricting an elderly or vulnerable adult's movement for the safety of the elderly or vulnerable adult under current medical supervision; and

(B) Neglect can be the result of repeated conduct or a single incident;

(6) "Physical harm" means any physical pain or injury, regardless of gravity or duration;

(7) "Psychological injury" means an injury to the intellectual functioning or emotional state of an elderly or vulnerable adult as evidenced by an observable or measurable reduction in the elderly or vulnerable adult's ability to function within that adult's customary range of performance or behavior;

(8) "Relative" means a spouse; child, including stepchild, adopted child, or foster child; parent, including stepparent, adoptive parent, or foster parent; sibling of the whole or half-blood; step-sibling; grandparent, of any degree; grandchildren, of any degree; and aunt, uncle, niece, and nephew, of any degree, who:

(A) Resides with or has frequent or prolonged contact with the elderly or vulnerable adult; and

(B) Knows or reasonably should know that the elderly or vulnerable adult is unable to adequately provide for the adult's own care or financial resources;

(9) "Serious physical harm" means physical harm of such gravity that:

(A) Would normally require medical treatment, medication, or hospitalization;

(B) Involves acute pain of such duration that it results in substantial suffering;

(C) Involves any degree of prolonged pain or suffering; or

(D) Involves any degree of prolonged incapacity;

(10) "Serious psychological injury" means a psychological injury of such gravity as would normally require psychological treatment, medication, or hospitalization;

(11) "Sexual exploitation" means an act of a sexual nature committed upon or in the presence of an elderly or vulnerable adult without that adult's consent. Sexual exploitation includes, but is not limited to, fondling, exposure of genitals to an elderly or vulnerable adult, exposure of sexual acts to an elderly or vulnerable adult, or exposure of an elderly or vulnerable adult's sexual organs. Sexual exploitation does not include any act intended for a valid medical purpose, or any act that may reasonably be construed to be a normal caregiving act or an appropriate display of affection; and

(12) "Vulnerable adult" means a person eighteen (18) years of age or older who, because of intellectual disability or physical dysfunction, is unable to fully manage the person's own resources, carry out all or a portion of the activities of daily living, or fully protect against neglect, exploitation, or hazardous or abusive situations without assistance from others.

39-15-502.

(a) It is an offense for a person to knowingly abuse an elderly or vulnerable adult.

(b) The offense of abuse of an elderly adult is a Class E felony.

(c) The offense of abuse of a vulnerable adult is a Class D felony.

39-15-503.

(a) A person commits the offense of aggravated abuse of an elderly or vulnerable adult who knowingly commits abuse pursuant to § 39-15-502, and:

(1) The act results in serious psychological injury or serious physical harm;

(2) A deadly weapon is used to accomplish the act;

(3) The abuse is committed by two (2) or more persons; or

(4) The abuse results in serious bodily injury, as defined in § 39-11-106.

(b) In order to prosecute and convict a person for a violation of subdivision (a)(1), it is not necessary for the state to prove the elderly or vulnerable adult sustained serious bodily injury as required by § 39-13-102, but only that the elements set out in subdivision (a)(1) occurred.

(c) A violation of subdivision (a)(1) is a Class C felony.

(d) A violation of subdivision (a)(2), (a)(3), or (a)(4) is a Class B felony.

39-15-504.

(a) It is an offense for a caretaker to knowingly neglect an elderly adult or vulnerable adult, so as to adversely affect the person's health or welfare.

(b) The offense of neglect of an elderly adult is a Class E felony.

(c) The offense of neglect of a vulnerable adult is a Class D felony.

(d) If the neglect is a result of abandonment or confinement and no injury occurred, then the neglect by abandonment or confinement of an elderly or vulnerable adult is a Class A misdemeanor.

39-15-505.

(a) A caretaker commits the offense of aggravated neglect of an elderly or vulnerable adult who commits neglect pursuant to § 39-15-504, and the act:

(1) Results in serious psychological injury or serious physical harm; or

(2) Results in serious bodily injury as defined by § 39-11-106.

(b) In order to prosecute and convict a person for a violation of subdivision (a)(1), it is not necessary for the state to prove the adult sustained serious bodily injury

as required by § 39-13-102, but only that the elements set out in subdivision (a)(1) occurred.

(c) A violation of subdivision (a)(1) is a Class C felony.

(d) A violation of subdivision (a)(2) is a Class B felony.

39-15-506.

(a) It is an offense for any person to knowingly sexually exploit an elderly adult or vulnerable adult.

(b) The offense of sexual exploitation of an elderly adult is a Class E felony.

(c) The offense of sexual exploitation of a vulnerable adult is a Class D felony.

39-15-507.

(a) It is an offense for any person to knowingly financially exploit an elderly or vulnerable adult.

(b) A violation of this section shall be punished as theft pursuant to § 39-14-105; provided, however, that the violation shall be punished one (1) classification higher than is otherwise provided in § 39-14-105. In no event shall a violation of this section be less than a Class D felony.

(c)

(1) If a person is charged with financial exploitation that involves the taking or loss of property valued at more than five thousand dollars (\$5,000), a prosecuting attorney may file a petition with the circuit, general sessions, or chancery court of the county in which the defendant has been charged to freeze the funds, assets, or property of the defendant in an amount up to one hundred fifty percent (150%) of the alleged value of funds, assets, or property in the defendant's pending criminal proceeding for purposes of restitution to the victim. The hearing on the petition may be held ex parte if necessary to prevent additional exploitation of the victim.

(2) Upon a showing of probable cause in the ex parte hearing, the court shall issue an order to freeze or seize the assets of the defendant in the amount calculated pursuant to subdivision (c)(1). A copy of the freeze or seize order shall be served upon the defendant whose assets have been frozen or seized.

(3) The court's order shall prohibit the sale, gifting, transfer, or wasting of the assets of the elderly or vulnerable adult, both real and personal, owned by, or vested in, such person, without the express permission of the court.

(4) At any time within thirty (30) days after service of the order to freeze or seize assets, the defendant or any person claiming an interest in the assets may file a motion to release the assets. The court shall hold a hearing on the motion no later than ten (10) days from the date the motion is filed.

(d) In any proceeding to release assets, the state has burden of proof, by a preponderance of the evidence, to show that the defendant used, was using, is about to use, or is intending to use any assets in any way that constitutes or would constitute an offense under subsection (a). If the court finds that any assets were being used, are about to be used, or are intended to be used in any way that constitutes or would constitute an offense under subsection (a), the court shall order the assets frozen or held until further order of the court.

(e) If the prosecution of the charge under subsection (a) is dismissed or a nolle prosequi is entered, or if a judgment of acquittal is entered, the court shall vacate the order to freeze or seize the assets.

(f) In addition to other remedies provided by law, an elderly or vulnerable adult in that person's own right, or by conservator or next friend, has a right of recovery in a civil action for financial exploitation or for theft of the person's money or property whether by fraud, deceit, coercion, or otherwise. The right of action against a wrongdoer shall not abate or be extinguished by the death of the elderly or vulnerable adult, but passes as

provided in § 20-5-106, unless the alleged wrongdoer is a relative, in which case the cause of action passes to the victim's personal representative.

39-15-508.

(a) Any transfer of property as defined in § 39-11-106(a) valued in excess of one thousand dollars (\$1,000) in a twelve-month period, whether in a single transaction or multiple transactions, by an elderly or vulnerable adult to a non-relative whom the transferor has known for fewer than two (2) years before the first transfer and for which the transferor did not receive reciprocal value in goods or services creates a permissive inference that the transfer was effectuated without the effective consent of the owner.

(b) Subsection (a) applies regardless of whether the transfer or transfers are denoted by the parties as a gift or loan except that it shall not apply to a valid loan evidenced in writing and which includes definite repayment dates. In the event repayment of any such loan is in default, in whole or in part, for more than sixty (60) days, the inference described in subsection (a) applies. Subsection (a) does not apply to persons or entities that operate a legitimate financial institution.

(c) This section does not apply to valid charitable donations to nonprofit organizations qualifying for tax exempt status under the internal revenue code.

(d) A court shall instruct jurors that they may, but are not required to, infer that the transfer of money or property was effectuated without the effective consent of the owner, with the intent to deprive the owner of the money or property, upon proof beyond a reasonable doubt of the facts listed in subsection (a). The court shall also instruct jurors that they may find a defendant guilty only if persuaded that each element of the offense has been proved beyond a reasonable doubt.

39-15-509. [Reserved.]

39-15-510.

(a) In cases where an alleged offense has been committed against an elderly or vulnerable adult, upon the state's motion, the court shall conduct a hearing to preserve the testimony of the victim within sixty (60) days of the defendant's initial court appearance whether the case originates in general sessions court or criminal court.

(b) An elderly or vulnerable adult victim's inability to attend judicial proceedings due to illness, or other mental or physical disability, shall be considered exceptional circumstances upon the state's motion to preserve testimony pursuant to Rule 17 of the Tennessee Rules of Criminal Procedure.

(c) The court shall consider an affidavit executed by the elderly or vulnerable adult's treating physician stating that the elderly or vulnerable adult is unable to attend court due to illness or other mental or physical disability as prima facie evidence of the need to preserve witness testimony by the taking of the adult's out-of-court deposition.

(d) The court shall order the defendant's attendance to the out-of-court deposition. The defendant may waive the defendant's attendance in writing.

39-15-511.

(a) The secretary of state shall create a no-solicitation list, which shall be exempt from § 10-7-503, specifically for elderly or vulnerable adults. The elderly or vulnerable adult, or the adult's designee, may register the adult's address, phone number, or both, to be placed on the list.

(b) Solicitors shall not solicit via home visit, mailing, telephone, electronic communication, or any other means, any individual registered on the list.

(c) The secretary of state may promulgate rules, as necessary, to carry out this section.

(d) A violation of subsection (b) is a Class B misdemeanor.

39-15-512.

(a) Any person having reasonable cause to suspect that an elderly or vulnerable adult is suffering or has suffered abuse, neglect, financial exploitation, or sexual exploitation shall report such abuse, neglect, or exploitation to adult protective services pursuant to title 71, chapter 6.

(b) Any person who knowingly fails to report as required in subsection (a) commits a Class A misdemeanor.

(c) Upon good cause shown, adult protective services shall cooperate with law enforcement to identify those persons, as defined in § 39-11-106(a), who knowingly fail to report abuse, neglect, financial exploitation, or sexual exploitation of an elderly or vulnerable adult.

39-15-513.

(a) If a person convicted of abuse, neglect, or exploitation under this part has no parental rights to the victim of such offense at the time of a court order issued pursuant to this section, then the court may, in its discretion, and in addition to any other punishment otherwise authorized by law, order the person to refrain from having any contact with the victim of the offense, including, but not limited to, attempted contact by telephone, in writing, by electronic mail, by internet services, including social networking websites, or by any other form of electronic communication.

(b)

(1) Following a conviction for a violation of § 39-15-502, § 39-15-503, § 39-15-504, § 39-15-505, § 39-15-506, or § 39-15-507, and at the discretion of the court, the clerk of the court shall notify the department of health of the conviction by sending a copy of the judgment in the manner set forth in § 68-11-1003 for inclusion on the registry pursuant to title 68, chapter 11, part 10.

(2) Upon receipt of a judgment of conviction for a violation of an offense set out in subdivision (b)(1), the department shall place the person or persons

convicted on the registry of persons who have abused, neglected, or financially or sexually exploited an elderly or vulnerable adult as provided in § 68-11-1003(c).

(3) Upon entry of the information in the registry, the department shall notify the person convicted, at the person's last known mailing address, of the person's inclusion on the registry. The person convicted shall not be entitled or given the opportunity to contest or dispute either the prior hearing conclusions or the content or terms of any criminal disposition, or attempt to refute the factual findings upon which the conclusions and determinations are based. The person convicted may challenge the accuracy of the report that the criminal disposition has occurred, such hearing conclusions were made, or any factual issue related to the correct identity of the person. If the person convicted makes such a challenge within sixty (60) days of notification of inclusion on the registry, the commissioner, or the commissioner's designee, shall afford the person an opportunity for a hearing on the matter that complies with the requirements of due process and the Uniform Administrative Procedures Act, compiled in title 4, chapter 5.

(c)

(1) In addition to any other punishment that may be imposed for a violation of § 39-15-502, § 39-15-503, § 39-15-504, § 39-15-505, § 39-15-506, or § 39-15-507, the court shall impose a fine of not less than five hundred dollars (\$500) for Class A or Class B misdemeanor convictions, and a fine of not less than one thousand dollars (\$1,000) for felony convictions. The fine shall not exceed the maximum fine established for the appropriate offense classification.

(2) The person convicted shall pay the fine to the clerk of the court imposing the sentence, who shall transfer it to the district attorney of the judicial

district in which the case was prosecuted. The district attorney shall credit the fine to a fund established for the purpose of educating, enforcing, and providing victim services for elderly and vulnerable adult prosecutions.

SECTION 3. Tennessee Code Annotated, Sections 39-14-111, 71-6-117, and 71-6-119, are deleted in their entireties.

SECTION 4. Tennessee Code Annotated, Section 39-13-202(a)(2), is amended by deleting the language "kidnapping" and substituting instead the language "kidnapping, aggravated abuse of an elderly or vulnerable adult, aggravated neglect of an elderly or vulnerable adult".

SECTION 5. Tennessee Code Annotated, Section 39-13-502(a), is amended by adding the following language as new subdivisions:

(4) The defendant knows or has reason to know that the victim is an elderly adult as defined by § 39-15-501, who is a resident of a healthcare provider, as defined by § 9-8-311, and the penetration is accomplished by a caretaker or employee who is paid by either the healthcare provider, the victim, or the victim's family; or

(5) The defendant knows or has reason to know the victim is a vulnerable adult, as defined by § 39-15-501.

SECTION 6. Tennessee Code Annotated, Section 39-13-504(a), is amended by renumbering the existing subdivision (a)(4) as subdivision (a)(6) and inserting the following as new subdivisions (a)(4) and (a)(5):

(4) The defendant knows or has reason to know that the victim is an elderly adult, as defined by § 39-15-501, who is a resident of a healthcare provider, as defined by § 9-8-311, and the unlawful sexual contact is accomplished by a caretaker or employee who is paid by either the healthcare provider, the victim, or the victim's family;

(5) The defendant knows or has reason to know the victim is a vulnerable adult, as defined by § 39-15-501; or

SECTION 7. Tennessee Code Annotated, Section 40-11-150(k)(1), is amended by deleting the language "§ 71-6-119" and substituting instead the language "§ 39-15-502, § 39-15-503, § 39-15-504, § 39-15-505, or § 39-15-506" and is further amended by deleting the language "§ 71-6-102" and substituting instead the language "§ 39-15-501".

SECTION 8. Tennessee Code Annotated, Section 40-35-313(a)(1)(B)(i)(c), is amended by deleting the language "a violation of § 71-6-117 or § 71-6-119" and substituting instead the language "a violation of § 39-15-504, § 39-15-505, or § 39-15-506".

SECTION 9. Tennessee Code Annotated, Section 40-35-313(a)(3)(A), is amended by deleting the language "on or after July 1, 2004" and substituting instead the language "on or after July 1, 2004, and prior to July 1, 2017, or charged with a violation of § 39-15-502 or § 39-15-504 on or after July 1, 2017".

SECTION 10. Tennessee Code Annotated, Section 71-6-120(h), is amended by deleting the language "71-6-117" and substituting instead the language "39-15-507".

SECTION 11. Tennessee Code Annotated, Section 71-6-124(a)(1)(A), is amended by deleting the language "§ 71-6-117" wherever it appears and substituting instead the language "§ 39-15-502, § 39-15-503, § 39-15-504, § 39-15-505, § 39-15-506, or § 39-15-507".

SECTION 12. For the purposes of promulgating the rules, this act shall take effect upon becoming law, the public welfare requiring it. For all other purposes, this act shall take effect July 1, 2017, the public welfare requiring it.